JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

Malayan Banking Bhd v Ching Suit Fee (t/a Prime Index Enterprise)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–719 OF 2005
SULAIMAN DAUD, T SELVENTHIRANATHAN AND ABDUL WAHAB PATAIL JJCA
3 AUGUST 2010

Banking — Banks and banking business — Letter of credit ('LC') — After releasing payment issuing bank demanded return of monies paid under LC because of defects in documents — Whether appellant had obligation to refund payment collected under LC for respondent — Whether issuing bank estopped from demanding return of payment after completion of process of payment under LC

Ching Suit Fee ('\the respondent'), a sole proprietor agreed to sell goods to a buyer in Taipei with payment to be by way of a letter of credit ('LC'). Upon receiving the LC the plaintiff's firm approached its bank, Malayan Banking Bhd ('the appellant'), to assist in the LC transaction by collecting payment on its behalf. The appellant bank then submitted the relevant documents as submitted to it by the respondent to the issuing bank in Taipei for payment. The issuing bank released payment to the reimbursing bank in Kuala Lumpur, which in turn released payment to the appellant bank, which credited the proceeds into the respondent's bank account with the appellant. However, two days later the issuing bank in Taipei demanded a return of the monies released on the grounds that there were various defects in the documents forwarded to it. Although the appellant declined at first to return the money and argued that the issuing bank had received and had sight of the documents before making payment, it later refunded the payment with interest amounting to RM1,716 to the issuing bank and demanded the sum from the respondent. When the appellant deducted the amount from the respondent firm's account with it, the respondent commenced an action to recover the monies so deducted from its account. The trial judge entered judgment for the respondent and allowed the claim for the return of the monies deducted from the respondent's account with the appellant. This was the appellant's appeal against that decision. The main issue for consideration in this appeal was whether the appellant had an obligation to refund the payment it had collected under a LC for the respondent.

Held, dismissing the appeal with costs:

(1) The issuing bank was entitled to demand strict compliance to the terms of the LC before making payment. Thus, if there were defects in the

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

documents forwarded to it, the issuing bank was entitled to refuse to release payment. However, in this case, the complaints of defects in documents and the demand for refund were made by the issuing bank after the documents had been accepted and payment made to the respondent/beneficiary of the LC. Having accepted the documents submitted and made payment on the same, without reservations, the issuing bank was estopped from demanding the return of the payment made on the grounds of alleged defects. As such the respondent was not obliged to refund the monies it had already collected from the issuing bank. Further, if an issuing bank could reverse its position after completion of the process of payment under a LC, this would defeat the goals of certainty and finality of payment, which letters of credit served to provide (see paras 16–19).

(2) From the evidence it was clear that the appellant acted as the respondent's bank. Acting on the respondent's behalf the appellant submitted the respondent's claim for payment and received the payment not for its own benefit but for the respondent. In these circumstances the appellant erred in acting on its own to refund monies to the issuing bank and then debiting the respondent's account, without being specifically authorised to do so by the respondent. The appellant cannot make the respondent bear the burden of its own error (see paras 20–21).

(3) The appellant's reliance upon an indemnity to support its argument that the transaction was carried out under UCP400, which provides for a right of recourse, was unnecessary (see para 22).

(4) Recovery of monies paid under a mistake under s 73 of the Contracts Act 1950 was a matter that could be raised by the issuing bank against the respondent and the appellant. If so, and the appellant chose not to dispute it, this did not entitle the appellant to pass on the cost to the respondent without prior notice or consent (see para 26).

[Bahasa Malaysia summary

Ching Suit Fee ('responden'), tuan punya tunggal bersetuju untuk menjual barang-barang kepada pembeli di Taipei dengan bayaran melalui surat-surat kredit ('SK'). Setelah menerima SK firma, plaintif telah menemui banknya, Malayan Banking Bhd ('perayu'), untuk membantunya dalam transaksi SK dengan memungut bayaran bagi pihaknya. Perayu bank kemudian menyerahkan dokumen-dokumen relevan seperti yang diserahkan kepadanya oleh responden kepada bank pengeluar di Taipei untuk pembayaran. Bank pengeluar mengeluarkan pembayaran semula kepada bank di Kuala Lumpur, yang mana akan mengeluarkan bayaran kepada bank perayu, yang akan mengkreditkan hasil kutipan kepada akaun responden bank dengan perayu. Walau bagaimanapun, dua hari kemudian bank pengeluar di Taipei menuntut pemulangan wang yang dikeluarkan atas dasar bahawa terdapat banyak

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

kecacatan dalam dokumen yang diserahkan kepadanya. Meskipun perayu menolak pada mulanya untuk memulangkan wang tersebut dan berhujah bahawa bank pengeluar telah menerima dan melihat dokumen-dokumen sebelum membuat bayaran, ia kemudiannya telah memulangkan bayaran tersebut dengan faedah berjumlah RM1,716 kepada bank pengeluar dan menuntut jumlah tersebut daripada responden. Apabila perayu menolak jumlah tersebut daripada akaun firma responden bersamanya, responden memulakan tindakan untuk mendapatkan semula wang yang ditolak daripada akaunnya. Hakim bicara memasukkan penghakiman untuk responden dan membenarkan tuntutan untuk pemulangan wang yang ditolak daripada akaun responden dengn perayu. Ini merupakan rayuan perayu terhadap keputusan tersebut. Isu utama untuk penentuan dalam rayuan ini adalah sama ada perayu mempunyai kewajipan untuk membayar semula bayaran yang dikutip di bawah SK untuk responden.

Diputuskan, menolak rayuan dengan kos:

(1) Bank pengeluar berhak untuk menuntut pematuhan tegas kepada terma-terma SK sebelum membuat bayaran. Justeru, sekiranya terdapat kecacatan dalam dokumen-dokumen yang diberikan kepadanya, bank pengeluar berhak menolak untuk mengeluarkan bayaran tersebut. Walau bagaimanapun, dalam kes ini, aduan-aduan tentang kecacatan dalam dokumen-dokumen dan tuntutan untuk pemulangan telah dibuat oleh bank pengeluar selepas dokumen-dokumen telah diterima dan pembayaran telah dibuat kepada responden/benefisiari SK. Dengan menerima dokumen-dokumen yang telah diserahkan dan membuat bayaran, tanpa ragu-ragu, bank pengeluar diestop daripada menuntut pemulangan bayaran yang dibuat atas alasan kecacatan. Oleh itu responden tidak bertanggungjawab untuk memulangkan wang yang telah dipungut daripada bank pengeluar. Tambahan, sekiranya bank pengeluar menterbalikkan keadaan selepas penyempurnaan proses pembayaran di bawah SK, ia akan mengalahkan tujuan kepastian dan kemuktamadan, yang cuba diperuntukkan oleh surat kredit tersebut (lihat perenggan 16–19).

(2) Daripada keterangan adalah jelas bahawa perayu bertindak sebagai bank responden. Dengan bertindak bagi pihak responden perayu telah menyerahkan tuntutan untuk bayaran responden dan telah menerima bayaran bukan untuk faedahnya sendiri tetapi untuk responden. Dalam keadaan ini perayu telah membuat kesilapan dengan bertindak secara sendiri untuk memulangkan wang kepada bank pengeluar dan kemudian mendebitkan akaun responden, tanpa dibenarkan dengan spesifik untuk melakukannya oleh responden. Perayu tidak patut membiarkan responden menanggung beban yang disebabkan oleh kesilapannya sendiri (lihat perenggan 20–21).

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

(3) Pergantungan perayu terhadap suatu indemniti untuk menyokong hujahannya bahawa transaksi telah dijalankan di bawah UCP400, yang mana memperuntukkan hak untuk tindakan, adalah tidak perlu (lihat perenggan 22).

(4) Tuntutan untuk wang yang dibayar atas kesilapan di bawah s 73 Akta Kontrak 1950 adalah perkara yang boleh dibangkitkan oleh bank pengeluar terhadap responden dan perayu. Sekiranya begitu, dan perayu memilih untuk tidak mempertikaikannya, ini tidak memberi hak kepada perayu untuk memindahkan kos kepada responden tanpa notis atau kebenaran terdahulu (lihat perenggan 26).]

Notes

For cases on letter of credit, see 1(2) Mallal's Digest (4th Ed, 2010 Reissue) paras 2292–2319.

Cases referred to

Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1999] 1 Lloyd's Rep 36, HL (refd)

United Bank Ltd v Bangue National de Paris & Ors [1991] 4 CLJ 1137 (Rep), HC (refd)

Legislation referred to

Contracts Act 1950 s 73

Appeal from: Civil Suit No S1-22-548 of 1993 (High Court, Kuala Lumpur)

GK Ganesan (SP Ong with him) (Abd Aziz Chen & Co) for the appellant.
K Ganesan (V Mugunthan with him) (Indra Gandhi & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The defendant/appellant Malayan Banking Bhd ('the appellant') appealed against the decision of the High Court to enter judgment for the plaintiff/respondent Ching Suit Fee ('the respondent') to return certain sums into the respondent's bank account with the appellant bank.

BACKGROUND

[2] The respondent is the sole proprietor of Prima Index Enterprise, a firm which sold certain goods to a buyer Mcmillan Enterprise Co Ltd in Taipei. Payment was agreed to be by way of a letter of credit.

[3] As submitted for the appellant, having received the letter of credit, the

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

plaintiffs firm went to the appellant, its bank, for service to collect payment. The respondent gave the relevant documents to the appellant.

[4] The appellant thereafter submitted the documents to the issuing bank, the Taipei Business Bank for payment. On 15 July 1993 the Hong Kong and Shanghai Bank in Kuala Lumpur acting as the reimbursing bank 'the reimbursing bank' for the issuing bank, sought confirmation from the issuing bank to release payment. Having obtained confirmation from its principal the issuing bank, the reimbursing bank released payment to the appellant who credited the proceeds to the respondent's bank account.

[5] Two days later, the reimbursing bank informed the appellant there were discrepancies in the documents forwarded. It wanted its money back.

[6] Having ignored the reimbursing bank initially, the appellant replied on 18 August 1993 to decline to return the money on the grounds the issuing bank had received and had sight of the documents before making payment.

[7] But later the appellant refunded the payment with interest amounting to RM1,726, and demanded the sum from the respondent and deducted the amounts from the respondent's firm's account.

[8] The respondent commenced this action to recover the sum.

[9] The learned trial judge allowed the claim for the return of the sums into the respondent's account. The appellant appealed.

LETTER OF CREDIT

[10] Although the respondent's claim was for the return of monies deducted from its banking account with the appellant bank, the latter's right to deduct the sum arises from whether it had an obligation to refund the payment it had collected under a letter of credit for the respondent.

[11] A letter of credit may be simply described as an instrument issued by an issuing bank at the request of its buyer customer whereby the bank promises to pay the seller beneficiary provided the latter presents the documents called for, exactly as stipulated in the letter of credit and meet all other terms and conditions set out in the letter of credit. The first principle of a letter of credit is that it is documentary. It addresses the problems of payment risk as well as of a party seeking to renege on a transaction on the basis of purported complaints, particularly in cross-border transactions. It replaces the buyer's credit-worthiness with the issuing bank's credit-worthiness and independence.

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

For the purposes of a claim under the letter of credit, the basic documents comprise documents of title and other documents enabling the buyer to claim the goods.

[12] A letter of credit comes into being generally in the following manner. A buyer and a seller agree upon a sale and purchase with payment by letter of credit. The buyer completes an application to its bank to issue a letter of credit, hence the term 'issuing bank', in favour of the seller, the intended beneficiary of the letter of credit. The issuing bank may send a pro-forma letter of credit to a bank typically located in the seller's country which verifies the letter of credit for authenticity and forwards the pro-forma letter of credit to the seller, or it may simply send the pro-forma letter of credit directly to the seller.

[13] The seller examines the pro-forma letter of credit to ensure it corresponds with the terms of the agreement between it and the buyer and that the documents stipulated in the pro-forma letter of credit can be produced and the terms and conditions of the pro-forma letter of credit can be fulfilled. Amendments may become necessary. When all parties finally agree to such amendments as may be desired, the amendments are incorporated into the terms of the letter of credit to be issued.

[14] It is prudent practice not to ship goods until the letter of credit with the agreed amendments are received. The seller then ships the goods and prepares or obtains the documents specified in the letter of credit. He then makes demand by presenting the documents within the specified period and before the expiry of the letter of credit, to the bank with whom the funds are available and authorised in the letter of credit to effect payment.

DEFECTS IN CLAIM DOCUMENTS

[15] The appellant's predicament in this case began when the issuing bank claimed that there were various defects in the documents.

[16] Ordinarily if there are defects in the documents, the issuing bank refuses to release payment. It is entitled to demand strict compliance to the terms of the letter of credit before the payment under the letter of credit is released. It is the issuing bank's prerogative to examine the documents as closely as it desires and where there are possible defects, to decide whether to accept or to reject the documents. Even if it were to reject the claim, it must under the Uniform Customs and Practice for Documentary Credits ICC No 400, (1983) arts 16 and 16(d) give notice promptly. See *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36. Otherwise it is obliged to make payment.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

[17] In this case, the complaint of defects in documents and demand for refund was made by the issuing bank after the documents had been accepted and payment made to the beneficiary of the letter of credit. Assuming there were indeed defects in the documents submitted for the respondent, the release of payment was either the issuing bank's own decision to accept the defect, or alternatively, error since it could properly have refused to honour the letter of credit until all parties come to fresh agreement to resolve the problem. Be it acceptance or error, it is internal to the issuing bank and involves neither the respondent nor the appellant. It is fair and just that estoppel applies.

[18] Having accepted the documents submitted and made payment, without reservations, the issuing bank is estopped from demanding the return of the payment made on the grounds of alleged defects. The respondent is not obliged to refund to the issuing bank or the reimbursing bank whose problem would arise if, and only if the buyer refuses to pay the issuing bank, or the issuing bank disputes with its reimbursing bank. The case of *United Bank Ltd v banque Nationale de Paris & Ors* [1991] 4 CLJ 1137 (Rep) amply illustrates the point. The parties in such an action are the issuing bank against a negotiating bank, an advising bank and the applicant for the letter of credit.

[19] For an issuing bank to be able to reverse its position after acceptance of the claim and the completion of the process of payment under a letter of credit would defeat the goals of certainty, promptness and finality of payment which letters of credit serve to provide to sellers in the context of an international trading system with minimal cross-border litigation.

RELATIONSHIP BETWEEN APPELLANT AND RESPONDENT

[20] As admitted in the submissions for the appellant, after receiving the letter of credit, the respondent asked the appellant to assist in the letter of credit transaction. The appellant, in this case, thus acted as the respondent's bank. The fact the appellant took the respondent's documents and forwarded the documents to the issuing bank for seek payment to the respondent does not metamorphose it into a 'negotiating bank'. It was a bank which accepts the documents for examination and, if these are found in order, credits the due amount to the beneficiary. It has no authority to conduct any negotiation. The learned judge went so far only to say the transaction was of a negotiating kind, but correctly did not, in light of the evidence, expressly find that the appellant was a negotiating bank, a term with a specific meaning in the law and practice relating to letters of credit. Acting on the respondent's behalf, the appellant submitted the respondent's claim for payment and received the payment. The payment was received not for its own benefit or account but for the respondent.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

[21] In these circumstances, the appellant erred in acting on its own to refund to the issuing bank and then to debit the respondent's account, without being specifically authorised to do so by the respondent. The appellant cannot make the respondent bear the burden of its own error.

INDEMNITY

[22] A letter of indemnity was relied upon as supporting the argument that the transaction was carried out under UCP 400 which provides for a right of recourse. The argument is unnecessary for if there is an indemnity, the appellant's recourse to the respondent is upon the indemnity and not UCP 400. However, the indemnity was suspect as to its authenticity and applicability to the transaction at hand. That is a finding of fact that does not require a plea of fraud.

[23] The respondent made a police report in which she stated that she had given the documents as well as a letter of indemnity to the appellant. Her letter of 21 August 1993 admitted signing a blank general indemnity. In the trial she maintained the letter of indemnity was for other purposes. It was submitted the trial court erred when it held the letter of indemnity suspicious because the date had been blanked over and accepted it was executed for another purpose.

[24] This issue was addressed before the learned judge. The learned judge who had the benefit of hearing the parties examine and cross-examine the witnesses thereon, was not shown to have erred in coming to a finding. The fact a party disagrees with the finding of a trial judge does not mean the judge had erred. It must be shown either the judge had made an error of law or made a finding contrary to the evidence before him. But he cannot be said to have erred if the evidence before him is not conclusive but required of him to make a finding after hearing conflicting or differing versions put before him by the parties. An appellate court cannot interfere with the finding of a trial court in such circumstances. Simply to substitute a finding of fact merely because the appellate court came to a different conclusion not only opens the gates to court shopping but is tantamount to contempt of the trial court even if it is not a contempt of court.

SECTION 73 OF THE CONTRACTS ACT 1950

[25] Reliance was also placed on s 73 of the Contracts Act 1950 (Act 136). It was submitted:

> 30. In so doing, under s 73 of the Contracts Act 1950 Act 136, the defendant became entitled to have the sum it refunded to the Taiwanese issuing Bank (TBB). Section 73 reads:

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Tue Aug 30 07:27:22 2011
//caseml/case/mlj/2011_004_mlj_747

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. …

[26] Recovery of monies paid under a mistake under s 73 is a matter that can be raised by the issuing bank against the respondent and appellant. The factual basis to such right has to be established by the issuing bank, which the appellant might choose not to dispute if it bears the cost itself, but is not entitled to do so without prior notice or consent of the respondent if the appellant intends to pas on the cost of it to the latter. Where it fails to do so it runs the risk of an action as in this case.

DECISION

[27] Having heard submissions from the parties, this court ordered the appeal be dismissed with costs fixed in the sum of RM5,000 in this court and below, confirmed the decision of the High Court and further ordered that the deposit be paid to the respondent towards costs.

[28] These grounds have been read and approved by Justice Sulaiman Daud and Justice T Selventhiranathan of the Court of Appeal.

Appeal dismissed with costs.

Reported by Kohila Nesan